Award No. 4730

Docket No. CL-4733

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

THE DENVER UNION STOCK YARD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that:

(1) The Denver Union Stock Yard Company violated the Clerks Agreement on October 14th, 1948, when it assigned Mr. Lloyd Pundt to position of Hay Lift Operator advertised on Vacancy Bulletin No. 196 on October 7th, 1948, and declined to consider application of Mr. Arthur Palcic who was senior to Mr. Pundt.

(2) The Denver Union Stock Yard Company now be required to place Mr. Palcic on the Hay Lift Operator position in line with the Rules of the Agreement, and

(3) That Mr. Palcic be compensated in addition to his regular salary, at the Hay Lift Operator's rate of pay for each and every day that he is illegally held off of the Hay Lift Operator position.

EMPLOYES' STATEMENT OF FACTS: On October 7th, 1948 the position of Hay Lift Operator was advertised for bid on vacancy Bulletin No. 196. Copy of Bulletin attached and shown as Employes' Exhibit "A".

The position was awarded to Mr. Lloyd Pundt, a junior applicant under assignment Notice dated October 14th, 1948. Copy attached and shown as Employes' Exhibit "B".

Mr. Palcic's seniority date is September 8th, 1937.

Mr. Pundt's seniority date is January 1st, 1946.

Mr. Palcic is a qualified Hay Lift Operator—copy of statement made by Mr. Palcic on November 11th, 1948 attached hereto and made a part hereof, and shown as Employes' Exhibit "C".

There has been a growing practice on this property of awarding positions to employes in violation of the Rules of the Agreement. There is also a growing dissatisfaction and resentment among employes concerning this practice, and they feel that if this practice is continued their seniority and right to promotion is a farce.

employe who has not fitted himself and where lack of fitness may cause substantial damage to property or death and injury to persons. It is automatic and axiomatic that on a position requiring much experience and ability the employe must show some interest and make some effort to fit himself and not wait until the position is open before making any effort. This is true in the rail industry and in all others. While this Company does provide training programs for employes under suitable conditions and expects to do this, the employe must cooperate. As far as this particular case is concerned, Employe Palcic has shown no such disposition and has not availed himself of the opportunity accorded by the Company to go through the training program.

We submit the case should be dismissed.

(Exhibits not reproduced.)

OPINION OF BOARD: On October 7, 1948, Carrier advertised for bids on a position of Hay Lift Operator. Claimant bid on the position but was refused appointment on the ground that he was not qualified and the position was awarded to a junior employe.

Employes contend that Claimant was qualified and further assert that he was a qualified Hay Lift Operator having had about ninety hours of experience. Carrier contends (1) that this Board has no jurisdiction for it has only been declared a common carrier so far as its loading and unloading of livestock is concerned, and (2) that the Claimant is not sufficiently qualified to handle the Lift in the intricate and complicated maneuvers which are required.

With respect to the question of jurisdiction, our attention has been called to three Awards of this Board involving the same agreement. It does not appear from the Opinions of those Awards that this jurisdictional question was raised or argued. That alone would appear to be sufficient authority to undertake the disposition of this case. In addition to that, however, it is clear that Carrier does feed livestock in transit; hence, the handling of hay as feed is a necessary incident to the loading and unloading of livestock and in that way so closely related to the common carrier activities as to be a part thereof. Accordingly, we have no hesitancy in concluding that this Board has jurisdiction.

Rule 6 of the Agreement between the parties reads as follows:

"PROMOTION BASIS

Employes covered by these rules shall be in line for promotions. Promotions shall be based upon seniority, fitness and ability. Fitness and ability being sufficient, seniority shall prevail.

NOTE: The word 'sufficient' as used in this rule is intended to more clearly establish the right of the senior employe to bid in a new position or vacancy where two or more employes have adequate fitness and ability."

The Board has had occasion to interpret rules of a similar and identical nature as that above-quoted in many Awards. Generally and briefly stated, the rule of those awards is that the Carrier in the first instance has the right to determine the fitness and ability of an employe for the position sought and that this Board will not substitute its judgment for that of the Carrier in the absence of bad faith, capriciousness, arbitrariness, bias or partiality. It has also pointed out that fitness and ability does not mean that the applicant is immediately qualified to step in and assume the duties of the position without guidance or assistance. It means that the applicant must have such training, experience and character as to raise a reasonable probability that he would be able to perform all the duties of the position within a reasonable time, usually the qualifying period fixed by the Agreement. The Carrier is required under the rule to give the position to the senior

applicant if his fitness and ability are sufficient and it may not properly insist upon the right to make the assignment to the applicant whom it deems best qualified.

We have reviewed the record in the light of these guiding principles. We find that Claimant has been employed by Carrier since 1937 as a laborer and had advanced himself through a position of Weighmaster, Counter and presently to Chute Foreman. In connection with his duties as Chute Foreman, he has had occasion to operate the Lift. Employes assert that he spent ninety hours in the operation. Carrier denies this, but admits that he spent some time in such work, asserting, however, that it was not in all phases of the operation but merely in the simpler maneuvering thereof. This much, however, is clear—that Claimant's record indicates a certain amount of aptitude and learning ability. He has a demonstrated ability to handle the Lift in some phases of its operation. He is filling a position of greater responsibility than that of the Lift Operator at the present time. It seems unreasonable to hold that such a man could not learn such phases of the work as may require more expert maneuvering of the Lift within a reasonable trial period. We think the employe has demonstrated sufficient fitness and ability to fulfill the duties of the position to which he aspired and that Carrier in refusing to award the same to him under the provisions of Rule 6 and the conditions of Rule 14 was in violation of the Agreement. Accordingly, claim (1) will be sustained.

It appears from the record that this position was a temporary one and abolished on February 1, 1949. Accordingly, claim (2) cannot be wholly sustained. However, in the event that the position should be reestablished during the busy season and Mr. Palcic is an applicant, his application should be given consideration in the light of what has been indicated in this opinion.

With respect to claim (3), we find no basis for sustaining the same. There is no provision in the Agreement which would support an award on such a basis. We see no basis in reason or logic for this Board taking any such action as is requested by that part of the claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That both parties to this dispute waived hearing thereon;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That Carrier violated the Agreement.

AWARD

Claim (1) sustained; claim (2) sustained to extent indicated in Opinion and Findings; claim (3) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 24th day of February, 1950.